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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

vs.

JULIUS MULLINS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE PENNSYLVANIA COAL MINING ASSOCIATION

FOR AMICUS CURIAE THE PENNSYLVANIA COAL MINING ASSOCIATION

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INTEREST OF AMICUS CURIAE

The Pennsylvania Coal Mining Association is a voluntary non-profit trade association comprised of 155 bituminous coal producers with mines located throughout the central and western Pennsylvania coal fields. The principal purpose of the Association, which maintains its headquarters at 240 N. Third Street, Harrisburg, Pennsylvania 17120, is to represent the interests of the coal mining industry and to cooperate with public authorities in dealing with problems that affect the industry. The Associ-

ation presents this brief on its own behalf and on behalf of its members. The Association members range in size from small producers mining less than 50,000 tons of coal a year, to larger companies with the capacity to produce in excess of 5 million tons annually. In 1980 the Association membership produced approximately 30 million tons of bituminous coal, out of a total State-wide production of 80 million tons.

The companies comprising the Association's members are not and have not been signatories to the National Bituminous Coal Wage Agreement, and their employees are either non-union or are represented by labor organizations other than the United Mine Workers of America (hereinafter UMWA). Wage and benefit levels maintained by the Association members are at least as favorable as those in mines organized by the UMWA, and in some instances are more favorable. With limited exceptions, health and retirement benefits for their employees are provided through corporate welfare and pension plans or insurance programs funded entirely by employer contributions.

The Association members (hereinafter *amici*) compete in essentially the same market for bituminous coal as the coal companies who are signatories to the National Bituminous Coal Wage Agreement.[1] *Amici* wish to bring to the Court's attention the fact that the purchase-of-coal

[1] The references herein to the National Bituminous Coal Wage Agreement include the successive national agreements entered into between the UMWA and the Bituminous Coal Operators' Association, and, in particular, the 1974 Agreement which is the subject of this litigation. The National Bituminous Coal Wage Agreement of 1978, and the currently effective National Agreement of 1981, contain the same purchase-of-coal clause here involved.

clause of the National Agreement, by imposing a penalty upon coal purchased by a signatory from a non-signatory company, has the effect of creating a substantial restraint of trade in the market for coal in interstate commerce, that by virtue of this clause non-signatory companies are effectively shut off from access to a significant portion of the coal sales market which would otherwise be available to them, and that *amici* as well as other non-signatory producers are made to suffer the consequences of an unreasonable restraint of trade effectuated by a "hot cargo" boycott on the coal they produce.

It is a common occurrence in the coal industry that a producer of coal must purchase coal from another producer in order to meet the specifications of a particular customer for a given grade and quality of coal. Insofar as steam coal is concerned almost all coal supply contracts contain specifications as to sulphur, ash and moisture qualities, as well as the BTU values of the coal to be delivered. Since coal seams vary widely in respect to these qualities a producer often has to blend his coal with coals produced by others to obtain the desired specifications.[2] There is thus an active sales market between coal producers as well as between coal producers and coal users.

Needless to say, cost considerations are significant in every commercial transaction. Hence, if a signatory to the National Bituminous Coal Agreement were to procure coal from a non-signatory producer his cost would be substantially increased by virtue of the added royalty amounts he is required to pay under the purchase-of-coal clause of the Agreement for each such ton of coal he

[2] A similar requirement for blending metallurgical coals of different volatility and coking characteristics is illustrated by Kaiser Steel Company's purchases of coal from Mid Continent Coal and Coke Company. See Kaiser's Petition for Certiorari, p. 4, n. 5.

procures. This cost penalty, which was $1.55 a ton under the 1974 National Agreement, was increased to $1.90 a ton under the 1978 Agreement, and is scheduled to rise to $2.23 a ton under the current 1981 National Agreement, obviously serves as a severe economic deterrent to a signatory's purchase of coal produced by non-signatory companies. In the intensely competitive coal market a cost differential of this magnitude virtually forecloses purchases from non-signatories.

The entire purpose and effect of the purchase-of-coal clause is to put economic pressure on signatory companies to refrain from dealing with non-signatories. As shown by the evidence presented by Kaiser Steel Company, the clause has no other purpose since the payments called for by the clause are not designed, or needed, to meet the funding requirements of the UMWA health and retirement funds to which they are to be made, nor is the amount of the payments related to any assumed differences between UMWA and non-UMWA wage and benefit levels. J. A. 280-81; 296-97.

In short, *amici* are on the receiving end—the victims, as it were—of a classic type of illegal agreement in restraint of trade proscribed by sections 1 and 2 of the Sherman Act, 15 U S C §§ 1 and 2, as well as an illegal hot cargo boycott intended to be outlawed by section 8(e) of the National Labor Relations Act, 29 U S C § 158(e). The refusal of the Court of Appeals and the district court to entertain Kaiser Steel's defense of illegality will, unless reversed, perpetuate this victimization of *amici*, and will also have far-reaching effects upon marketing of bituminous coal in both domestic and foreign markets. For this reason *amici* urge the Court to reverse the decision of the Court of Appeals below.

Consent for the filing of this *Amicus Curiae* brief has been granted by counsel for Petitioner and Respondents.

BOTH THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE ON-GOING NATURE OF THE RESTRAINT OF TRADE EFFECTUATED BY THE PURCHASE-OF-COAL CLAUSE

In their suit against Kaiser Steel Company the UMWA Trustees seek to enforce royalty payments claimed to be payable under the purchase-of-coal clause of the 1974 National Bituminous Coal Wage Agreement. In opposing the Trustees' motion for summary judgment Kaiser Steel Company asserted that the clause constitutes an illegal agreement in restraint of trade in violation of the antitrust laws, as well as an unlawful hot cargo clause. The district court ruled that the claim of illegality was not a valid antitrust defense and that the terms of the clause should be enforced "whether or not it fosters illegal ends" under the antitrust laws (App. p. 75a). The court also refused to consider Kaiser's hot cargo defense on grounds that that issue was within the exclusive jurisdiction of the National Labor Relations Board rather than the court.

The court rejected Kaiser's antitrust defense on the basis of its interpretation of *Kelly* v. *Kosuga*, 358 U. S. 516 (1969), finding, *inter alia*, that requiring payments pursuant to the purchase-of-coal clause cannot be said to be enforcing a restraint of trade because the 1974 National Agreement *had expired* prior to the time the suit was brought, and the Kaiser contract for purchase-of-coal was completed. As stated by the court:

> "The contract is at an end—decisions to purchase or not to purchase [non-signatory coal] have been made and acted upon. Whether or not an express or

> implied agreement not to make *future* purchases of coal like the non-delivery agreement referred to in *Kelly* at 521, 79 S. Ct. 429, would warrant a different result, the court concludes that requiring payments pursuant to the purchase-of-coal clause cannot be said to be enforcing a restraint of trade within the meaning of *Kelly* v. *Kosuga.*" App. p. 77a. Emphasis in original.

In affirming the district court's order the Court of Appeals majority (Judge Wilkey dissenting) endorsed this reasoning of the district court, again relying on the analogy with the contract arrangement in *Kelly* v. *Kosuga.*

In comparing the present case with *Kelly* v. *Kosuga* both the district court and the court of appeals majority noted that in *Kelly* it was held that the contract for the sale of onions had been completed at a fair price prior to the purchaser's assertion of a defense of anti-trust illegality, and the illegality claim was not allowed to defeat the seller's claim. A similar rule should be applied in the present case, the district court concluded, because "the Trustees are seeking to recover one component of agreed compensation pursuant to the terms of a contract which has expired." App. 77a.

This analogy is faulty for a number of reasons, the most important being that the effect of the purchase-of-coal clause did not end with the 1974 National Agreement, nor with the coal purchases made by Kaiser Steel. The clause, as previously shown, has been carried forward into the 1978 National Agreement, and the current 1981 Agreement. As noted by the dissenting member of the court of appeals (Judge Wilkey) "Enforcement of this illegal claim in the now expired contract will, of course, have future effects. The same clause is present in the current contract. On the basis of this precedent, all the

trustees have to do respecting the present contract is wait until it expires and automatically collect on it too. By enforcing an illegal contract in this suit the court provides a precedent for enforcement in the future of a contract which Congress has outlawed." App. p. 47a.

Accordingly, the anti-trust restraints and the illegal boycott imposed by this contract clause have by no means come to an end. Unless the Court squarely resolves the issues raised by the Kaiser defenses the clause will continue to interpose severe economic restraints upon sales of coal between the companies signatory to the National Agreement and non-signatory companies.

ENFORCEMENT OF THE OBLIGATION TO PAY ROYALTIES PURSUANT TO THE PURCHASE-OF-COAL CLAUSE IS INSEPARABLE FROM ENFORCEMENT OF THE RESTRICTIVE SCHEME OF THE CLAUSE ITSELF

After refusing to entertain Kaiser's antitrust defense or to receive any evidence or proof on the issues presented, the district court proceeded to hold that the illegality of the purchase-of-coal clause would not present a bar to its enforcement in any event. The Court stated that:

> "The general rule emerging from *Kelly* is that a contract should be enforced whether or not it fosters illegal ends, unless the alleged illegality is of such a character that enforcement of the contract would 'make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act.' " App. p. 75a.

The Court of Appeals concluded that the district court correctly held that Kaiser was not entitled to interpose the illegality defense, and proceeded by implication to treat

the clause as valid. Borrowing language from *Kelly* v. *Kosuga*, the Court of Appeals majority concluded that the purchase-of-coal clause is "an intelligible economic transaction in itself," and thus the defense of antitrust illegality does not lie against it. App. p. 13a. The gist of this argument seems to be that the royalty payments required by the purchase-of-coal clause are part of the compensation benefits for employees covered by the 1974 Agreement, and are separable from the other provisions of the purchase-of-coal clause which impose restraints on purchases of coal. This reliance on *Kelly* is entirely misplaced. Far from being a separable or intelligible transaction in itself, the royalty payment is part and parcel of the illegal scheme to restrain signatory companies from dealing with non-signatory producers. The restrictive scheme is made effective only through the royalty provision. It is the royalty payment requirement which gives teeth to the restrictive arrangement because the royalty payment is the penalty a signatory must pay for purchasing non-signatory coal.

In *Kelly* the Court was able to separate the legal transaction for the sale of onions from the illegal scheme to restrain trade. The purchaser who received the thirteen carloads of onions was obligated to pay the price he had agreed to pay for them even though he had entered into a collateral agreement to hold them off the market as part of a collusive scheme to raise the market price. In requiring the purchaser to pay for the onions he had actually received the Court was not enforcing the *illegal* part of the contract, i.e. the collusive price-fixing scheme, but only the agreement to pay for goods received. The agreement to pay for goods received was, in the view of the Court, a separate intelligible transaction from the collateral agreement to hold the onions off the market.

There is no valid analogy between that situation and the present case. In the present case it is not possible to separate the obligation to pay the purchased coal royalty from the illegal boycott scheme, because it is only through the royalty payment that the illegal scheme is effectuated. The royalty payment is the sanction imposed by the contract for dealing with non-signatory producers, and when the courts enforce the obligation to pay the purchased coal royalty they are enforcing the scheme in restraint of trade. Hence, enforcement of the royalty payments here reaches, in the words of this Court, "[T]he point where the judgement of the Court would itself be enforcing the precise conduct made unlawful by the Act . . ." *Kelly* v. *Kosuga*, 358 U. S. at 520-521.

It is thus apparent that the Court of Appeals majority, and the trial court, misconceived the import of *Kelly*, and proceeded to draw from *Kelly* a completely false premise upon which to base their respective decisions in the present case.

THE PUBLIC POLICY CONSIDERATIONS CITED BY THE COURT OF APPEALS DO NOT JUSTIFY ENFORCEMENT OF AN ILLEGAL CONTRACT CLAUSE

In affirming the district court ruling the Court of Appeals majority chose to disregard the established law and public policy regarding unenforceability of illegal agreements, and proceeded to develop a series of superficial rationalizations for rejecting Kaiser's defenses. The majority opinion of the Court of Appeals, for example, purports to place great weight on considerations of "public interest," in respect to protecting the integrity of a collective bargaining agreement and the fostering of an orderly

administration of federal labor law. App. p. 32a, 33a. The majority also suggests that the trustees of a Union Welfare Fund should be "immune from contract defenses that could be asserted against the union itself because such a rule better serves the concern of federal labor policy to protect union members and their families from the actionable wrongs of their union representatives." App. p. 17a.

This reasoning is obviously specious. The "integrity" of collective bargaining agreements cannot be protected by a rule which sanctions and approves enforcement of such agreements even when they are patently illegal. If the courts reward illegality in union agreements there is not much "integrity" left to protect. Nor is it logical to say that enforcement of illegal clauses "fosters orderly administration of federal labor law."

There are, moreover, other compelling public policy considerations involved here which the majority did not attempt to balance. Both the Sherman Act and the Labor Management Relations Act reflect long-standing Congressional policy that interstate commerce must remain economically unhindered by unreasonable restraints of trade and illegal secondary boycotts. See, e.g. *Allen Bradley Co.* v. *Electrical Workers Union*, 325 U. S. 797 (1945); *Connell Co.* v. *Plumbers and Steamfitters Local*, 421 U. S. 616 (1975). Prior to ordering enforcement of the purchase-of-coal clause the courts below should have weighed all of the competing public policies involved to determine whether the public interest in enforcement of collective bargaining agreements is outweighed by those public policies militating against enforcement. By refusing to consider Kaiser Steel's affirmative defenses, and to examine into the effect of the objectionable contract clause on competition in the market for bituminous coal, the trial

court and the Court of Appeals abdicated basic responsibilities and prerogatives of the federal courts. By sanctioning enforcement of the purchase-of-coal clause without consideration of Kaiser's defenses the courts below are in the position of encouraging conduct which is not only destructive of the public interest but is also expressly prohibited by statute.

THE FEDERAL COURTS HAVE JURISDICTION TO DECIDE WHETHER A CONTRACT PROVISION VIOLATES SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT

The purchase-of-coal clause constitutes in practical effect a union-coerced agreement to refrain from doing business with coal producers who are not signatory to the National Agreement of the UMWA, and, as such, creates a current and ongoing illegal hot cargo boycott against coal produced by neutral third parties who are not involved in any labor dispute with the union. The targets of such boycott are the non-signatory producers *and their employees.*

Section 8(e) of the National Labor Relations Act states that "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void."

Because the purchase-of-coal clause requires signatory employers, under pain of a monetary penalty, to refrain from purchasing coal from non-signatory companies it clearly falls within the section 8(e) prohibition,

and Kaiser Steel Company properly raised section 8(e) as a defense to enforcement of the purchased coal penalty here.

In refusing to consider Kaiser's section 8(e) defense the district court reasoned that because the conduct proscribed by section 8(e) is designated as an unfair labor practice the exclusive jurisdiction to consider the issue resides in the National Labor Relations Board; citing *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959). App. p. 77a. The Court of Appeals majority similarly concluded that an employer who voluntarily accedes to a hot cargo clause, "coerced only by the desire to avoid an economic strike," is relegated to an unfair labor practice remedy before the Board. App. p. 21a. The court majority went on to hold that while section 8(e) expressly provides that such agreements are unenforceable and void, the statute doesn't mean what it says, and that allowing Kaiser to assert a section 8(e) defense in this suit "would not only expand its remedies beyond what is necessary to give full effect to the language of the Act but would also interfere with protection to others which the labor law affords"—in this case the UMWA Trustees.

In reaching for this extraordinary interpretation of statutory language, which is plain and unambiguous on its face, the majority brushed aside the decision of this Court in *Connell Co.* v. *Plumbers and Steamfitters Local,* 421 U. S. 616 (1975), which constitutes a complete refutation of their reasoning. Since *Connell* stands on its own feet, and since further argument on this point will no doubt be fully developed in the brief which will be filed by Kaiser here, *amici* will not burden the Court with further discussion of this issue other than to say that the preemption ruling by the Court of Appeals is patently wrong, and is in direct conflict with the decisions of this Court.

CONCLUSION

The holding of the courts below that a contract clause may be enforced regardless of its illegality creates a precedent which could well be destructive of established principles of contract law. The trial court had a duty to examine into the illegality issues raised by Kaiser, and its refusal to do so was egregious error. The decision of the majority of the court of appeals compounds this error, and should be reversed.

Respectfully submitted,

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